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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GILBERT COLE, Defendant and Appellant.	B200369 (Los Angeles County Super. Ct. No. PA050263)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

Mark S. Givens, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Gilbert Cole appeals from a judgment entered after a jury found him guilty of count 1, first degree residential burglary (Pen. Code, § 459)[1] and count 2, second degree robbery (§ 211).[2] Appellant admitted that he had suffered three prior serious or violent felony convictions within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). Appellant was sentenced to state prison for two consecutive terms of 25 years to life plus a consecutive five year term pursuant to section 667, subdivision (a)(1). We affirm.

CONTENTIONS

Appellant contends that: (1) the trial court erred in admitting evidence of an uncharged grand theft auto; (2) the trial court erred in admitting evidence of appellant's flight; (3) the errors were cumulative; and (4) the trial court erred in refusing to strike a prior under section 1385.

FACTS AND PROCEDURAL HISTORY

On October 19, 2004, around 6:00 p.m., appellant broke into the residence of Vicki Marasco (Marasco), but was not apprehended until two years later. That night, police officers responding to a burglary call at the residence arrested appellant's girlfriend, Adriana Rendon (Rendon), who was sitting in the driver's seat of appellant's car with his wallet in her purse. Officers noticed that Rendon, who was parked near the Marasco residence, was speaking to someone on the cell phone when they approached her. Rendon's cell phone showed that her last call had been to appellant's cell phone, which was found lying in the entryway of Marasco's home.

At 8:40 p.m. that evening, Edward Andrews (Andrews) noticed appellant sitting in the front passenger seat of Andrews's Ford Explorer that was parked in his driveway. Andrews's house was a short distance away from the Marasco residence. Andrews

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The jury found appellant not guilty of count 3, petty theft with priors (§ 666).

grabbed appellant and dragged him out of the truck. But when appellant reached into his jacket, Andrews thought appellant had a firearm and ran to his house to retrieve his handgun. A cell phone, credit card, and .32-caliber Beretta handgun were stolen from Andrews's truck. Andrews found a glove and sweatshirt inside the truck that did not belong to him. Los Angeles Police Department Officer Paul McLaughlin responded to Andrews's address and obtained a description of appellant. Andrews identified appellant's photo from a photographic lineup two days after the incident.

At 9:45 p.m. that same evening, Officer McLaughlin was flagged down by Yonatan Haroush who reported that his truck had been stolen. The truck was stolen a short distance away from Andrews's house, and was recovered several weeks later a quarter of a mile from appellant's residence.

On October 21, 2004, detectives attempted to arrest appellant at the motor home where he lived in Arleta. As they spoke to someone in the motor home, appellant broke a rear window, then fled through the front door and ran into a neighbor's house. Police officers were unable to apprehend appellant even with the use of canine units and helicopter support. On October 29, 2004, detectives interviewed appellant's sister and informed her that appellant was involved in a burglary, robbery, and grand theft auto. On November 18, 2004, appellant called Los Angeles Police Department Detective Richard Potter, provided his date of birth and an identification number, and told him that he had been involved in the burglary, robbery, and grand theft auto, and that he had been able to evade the detectives and canine units. He told the detective that he did not want to turn himself in and that he was trying to get enough money to move out of state.

About two years later, on August 31, 2006, Los Angeles Police Department Officer Jeff Jensen saw appellant exit a shopping center at a high rate of speed in a pickup truck. A high speed chase ensued. Appellant eventually stopped the truck and ran away. He was arrested following a foot pursuit.

Prior to trial, the trial court granted defense counsel's section 995 motion to dismiss count 4, grand theft auto (§ 487, subd. (d)(1)) based on the theft of Haroush's truck, for lack of sufficient evidence. During trial, the People argued that the evidence of

the uncharged grand theft auto crime should be admitted for purposes of showing appellant's intent to steal at separate locations. The trial court ruled that the evidence was admissible to show intent but not identity under Evidence Code section 1101. The trial court gave a limiting instruction advising the jury that the evidence of the uncharged crime could only be considered if the People proved that appellant committed the uncharged crime by a preponderance of the evidence. The instruction further provided that it could be used to decide whether appellant acted with the intent to permanently deprive a victim of his property in this case. The instruction precluded the jury from considering the evidence to conclude that appellant was a person of bad character or that he had a disposition to commit crimes.

DISCUSSION

I. The trial court did not abuse its discretion by admitting evidence of the uncharged grand theft auto

Appellant urges that the trial court abused its discretion in admitting evidence that appellant committed the uncharged crime of stealing Haroush's truck. We disagree.

Evidence Code section 1101, subdivision (a) provides that evidence of a defendant's other misconduct is inadmissible to prove the defendant's propensity to commit the charged crime. (Evid. Code, § 1101, subd. (a).) Evidence Code section 1101, subdivision (b) permits the use of such evidence when the evidence is relevant to establish some fact other than the person's character or disposition such as intent, the existence of a common plan, the identity of the perpetrator, preparation, knowledge, or the absence of mistake or accident. (Evid. Code, § 1101, subd. (b).)

Whether the other crimes evidence is admissible depends on: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence. (*People v. Sully* (1991) 53 Cal.3d 1195, 1224.) To be admissible to show intent the prior conduct and charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) Pursuant to Evidence Code

section 352, the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Here, the trial court acted within its discretion to admit the evidence of the grand theft auto based on intent. As the trial court noted, the prior conduct and charged offense need only be sufficiently similar to support the inference that appellant probably harbored the same intent in each instance. Appellant broke into Marasco's residence at night. He then broke into Andrews's car that same evening. The evidence shows that Haroush's vehicle was stolen that same night a short distance away from Andrews's house, and was recovered several weeks later a quarter of a mile from appellant's residence. Thus, the evidence of the uncharged crime was sufficiently similar to the charged crimes of robbery and burglary to show appellant's intent in taking Haroush's vehicle. Accordingly, the sequence of events shows appellant's intent to burglarize, to rob, and then to steal a getaway car as his plans were thwarted. Appellant broke into Marasco's residence, but was interrupted by police before he could steal anything. Rendon was arrested with appellant's wallet, and his cellular phone was left in Marasco's entryway. Thus, appellant stole Andrew's phone and credit cards to replace his missing phone and wallet, but was frightened off by Andrews. Then, having no getaway vehicle, he stole Haroush's truck.

Finally, the trial court gave limiting instructions to the jury that it could not consider the evidence to prove that appellant was a person of bad character or that he had a disposition to commit crimes. We presume the jury followed the instructions given by the trial court. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919.)

In any event, even had the trial court abused its discretion in admitting the evidence, there is no reasonable probability the jury would have reached a different verdict had the challenged evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence was overwhelming that appellant committed the crimes of which he was convicted. Appellant dropped his cell phone, which showed his call

history, at the burglary scene. Rendon was sitting in appellant's car in front of the burglarized residence. Rendon had appellant's wallet in the car and her cell phone showed that she had called appellant prior to being apprehended by the police. Andrews struggled with appellant, who Andrews found sitting in his truck. Items were later found missing from that truck. Andrews identified appellant to the police. Appellant later called Detective Potter and admitted that he had been involved in the burglary, robbery and auto theft.

We conclude that the trial court did not abuse its discretion in admitting evidence of the uncharged crime.

II. The trial court properly admitted evidence of appellant's flight

Appellant next contends that the trial court erred in allowing the People to introduce evidence that appellant fled from officers on August 31, 2006, almost two years after the crimes for which he was on trial occurred, because the evidence was too remote in time, irrelevant, and inflammatory. He claims that the evidence should have been excluded under Evidence Code section 352 and that its admission violated Evidence Code section 1101, subdivision (a) because it impermissibly showed his propensity for committing crimes. We disagree.

In *People v. Mason* (1991) 52 Cal.3d 909, 941 our Supreme Court held that evidence of flight was properly admitted despite the defendant's argument that the flight was remote because it took place four weeks after the charged offenses. In rejecting the defendant's argument that the flight was so remote that it had marginal probative value, the court stated: "Common sense, however, suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as multiple murders after only a few weeks. Nor do our decisions create inflexible rules about the required proximity between crime and flight. Instead, the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt." (*Ibid.*)

Here, the trial court did not abuse its discretion in admitting the evidence of appellant's flight from the officer who noticed him speeding out of the shopping mall. While it is true that the flight occurred almost two years after the charged crimes, the

record shows that appellant made continuing attempts to evade capture after he committed the crimes. He escaped from the scene of the burglary, stealing items from Andrews and using Haroush's truck to aid him in his escape. Two days later, when police attempted to apprehend him at his motor home, he again escaped. A few weeks later, appellant called police, identified himself, admitted his involvement in the charged and uncharged crimes, then told them that he planned to leave the state. And, as we shall discuss, appellant had an extensive criminal record, exposing him to lengthy incarceration. Accordingly, we cannot say that evidence of appellant's flight almost two years later falls outside the pattern of escape, or that it was more prejudicial than probative.

We are not convinced otherwise by appellant's speculative argument that evidence of the high speed exit from the shopping mall led to a possible inference that appellant may have just committed some other offense from which he was fleeing. Nor do we find persuasive appellant's argument that the trial court erroneously admitted evidence of uncharged bad acts, uncharged crimes, and propensity evidence based on his flight from the shopping mall pursuant to Evidence Code section 1101, subdivision (a). The evidence of flight was admitted in order to show consciousness of guilt and the jury was so instructed.

In any event, it is not reasonably probable that if the challenged evidence had not been admitted, the jury would have reached a different result. (*People v. Scheid* (1997) 16 Cal.4th 1, 21.) As previously discussed, the evidence was overwhelming that appellant committed the crimes of which he was convicted. We conclude that the trial court did not abuse its discretion in admitting the challenged evidence of flight. Accordingly, we conclude that there was no cumulative error. (*People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692.)

III. The trial court did not abuse its discretion in refusing to strike one or more of appellant's prior strikes

Appellant contends that the trial court abused its discretion in denying his motion to strike his prior strikes because his prior offenses were remote in time. We disagree.

Section 1385 authorizes the trial court to strike prior convictions in "furtherance of justice." The term "'furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People,* in determining whether there should be a dismissal. [Citations.]" (*People v. Superior Court* (*Romero*) 13 Cal.4th 497, 530.) The courts must recognize society's legitimate interest in the fair prosecution of crimes properly alleged by refraining from arbitrarily cutting those rights without a showing of detriment. (*Id.* at p. 531.) A trial court abuses its discretion if it strikes a prior conviction allegation simply because a defendant pleads guilty; or because it may have a personal antipathy for the harsh sentencing result that the "Three Strikes" law would have on the defendant while ignoring the defendant's background, the nature of his present offense, and other individualized considerations. (*Ibid.*)

The record shows that appellant admitted suffering four prior felony convictions arising out of a 1985 conviction for voluntary manslaughter and a 1992 conviction for two counts of residential burglary, and one count of assault with a deadly weapon on a police officer. Appellant's extensive criminal history spans 30 years and includes at least 10 felonies and two misdemeanors. The trial court noted appellant's history and that he was on parole at the time he committed the instant offense. There was no abuse of discretion in the trial court's determination that appellant was well within the scheme of the Three Strikes law and the court's refusal to strike his prior convictions.

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ